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April 29, 1998

Ms. Carol Grazner Ropski
U.S. EPA - Region V
Emergency Enforcement & Support
Section SE-5J
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

RE: *Valleycrest Landfill/North Sanitary Landfill Site*
Request to Supplement Administrative Record

Dear Ms. Ropski:

On behalf of North Sanitary Landfill Company, Industrial Waste Disposal and Blaylock Trucking Company (collectively Waste Management of Ohio, Inc.), General Motors Corporation, NCR Corporation, and Danis Industries Corporation, (hereinafter referred to as "our Group") we ask that this letter and the enclosed attachments as well as my earlier letter of April 3, 1998 (Exhibit 1) be added to the administrative record for the proposed Administrative Order by Consent pursuant to Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for the Valleycrest Superfund Site ("Site"). We assume that the draft Administrative Order by Consent (hereinafter "Draft AOC") has already been made a part of the administrative record, if not, then we hereby so request.

To support a removal order under Section 106 of CERCLA, U.S. EPA must show "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility...." 42 U.S.C. §9606(a). The scope of "imminent and substantial" has been the subject of some uncertainty for many years, with U.S. EPA and U.S. DOJ arguing for an expansive reading, requiring only a minimal showing and industry arguing that Section 106 orders were meant to address emergency situations only and all other situations should be addressed by a RI/FS. Recently, however, the United States Supreme Court clarified the circumstances constituting an "imminent" endangerment, finding that "[a]n endangerment can only be 'imminent' if it 'threaten[s] to occur immediately" *Meghrig v. KFC Western, Inc.*, 116 S Ct. 1251,1254 (1996) (Interpreting the "imminent and substantial endangerment" language of the Resource Conservation and Recovery Act) (Emphasis added). Based upon the

complete Administrative Record, there is no imminent endangerment as interpreted by the Supreme Court which exists with respect to the alleged subsurface drums at the Valleycrest Superfund Site. As discussed in more detail below, U.S. EPA has long known about the existence of drums at the Site and until the notice letter of March 18, 1998, had not seen it appropriate to take any removal action. This is curious because we now know much more about Site conditions, groundwater hydrology, and the nature and extent of any alleged groundwater contamination than U.S. EPA did when it first assigned a HRS number for the site. The more information we gather, the lower the risk seemingly posed by this Site becomes, making what would have been a stretch in 1989 to justify a time-critical removal action to plainly insupportable in 1998 with the current status of facts. Consequently, a removal action order under Section 106 is not warranted or authorized. As we advised previously, our Group along with four other companies, the City of Dayton, and Montgomery County (hereinafter "VLSG") have agreed to conduct a Remedial Investigation and Feasibility Study (RI/FS) under Ohio Environmental Protection Agency ("Ohio EPA") oversight pursuant to Director's Final Findings & Orders ("FFOs"). (FFOs attached as Exhibit 2.) The Ohio EPA is authorized to take state-lead enforcement actions at the Site pursuant to a U.S. EPA and Ohio EPA cooperative agreement dated September 1992. (Exhibit 3.) Consequently, concerns related to the Site are already being addressed through mechanisms established by CERCLA.

For the reasons stated below, there has been no showing of an imminent endangerment with respect to the alleged subsurface drums at the Site and accordingly U.S. EPA should permit the Site RI/FS to proceed as provided for under the FFOs.

A. Recent Activities have Improved Site Conditions.

The presence of drums at the Site has been a long-established fact. U.S. EPA commenced investigations at the Site in 1989. At that time U.S. EPA investigators identified the historical disposal of drums to the landfill through photographs of drums that were taken at the landfill in the early 1970's and through interviews with Site operators and neighbors (FIT Report Exhibit 6 pg.4 and Expanded FIT Report Exhibit 7 pg. 2-17.) The FIT identified two locations of geophysical anomolies on the western portion of the Site that in the contractor's opinion "may be caused by drums disposed of at these locations." (Expanded FIT Report pg. 41-1).

The VLSG is proceeding with a RI/FS pursuant to the Ohio EPA's FFOs. Under these orders the VLSG will complete the investigation of the Site and present remedial alternatives that will be consistent with the National Contingency Plan. At that time, after the necessary additional information is gathered on the alleged subsurface drums and the condition of the groundwater, remedial/removal alternatives can be identified that are consistent with the National Contingency Plan.

Pursuant to a "time critical emergency" project identified by the Ohio EPA (hereinafter "Fire Mitigation Project") drums were removed from the surface of the landfill. (Fire Mitigation & Emergency Response Preparation report Exhibit 5). Consequently, present Site conditions are substantially improved over the conditions that existed when U.S. EPA began the evaluation process in 1989.

B. Groundwater Conditions.

Regional Setting

1) Site data do not indicate that the Site as a whole, or the alleged subsurface drums in particular have caused regional groundwater contamination. Municipal production wells are located one-half mile to the north of the Site and one-half mile to the south of the Site. Wells to the north are on the north side of the Miami River which flows north of the Site. Wells to the south of the Site are located south of the Dayton Hydrobowl which is south of the Site. (Map of Site and surrounding area Exhibit 10.)

2) The regional hydrogeologic setting indicates that recharge for the two municipal wellfields will occur from the river and Hydrobowl that are between the wellfields and the Site. (Figure 1.1 of the Revised Addendum to the Phase I Remedial Investigation Interim Technical Memorandum [hereinafter "ITM Report"] Exhibit 11.) Thus, there is very little potential that the groundwater beneath the Site would directly impact either wellfield.

3) Monitoring wells installed by the City of Dayton northwest of the Site suggest contamination from a source other than the Site. Van Dyne Crotty, Shell, Sunoco, and BP, located to the west of the Site, are performing groundwater pump and treat remediation projects. (ITM Report Exhibit 11 at pg. 15.)

Local Setting

1) The VLSG has collected groundwater flow measurements for the shallow and lower aquifers beneath the Site and in the surrounding area. These data indicate a general groundwater flow direction from east to west, in both the upper aquifer and the lower aquifer. (Figures 3.4 through 3.11 of the ITM Report Exhibit 11.) Thus, again there is very little potential that the groundwater beneath the Site would directly impact either wellfield which are located to the north and south respectively of the Site.

2) The VLSG has collected groundwater samples from the shallow and lower aquifer on the Site. (ITM Report Exhibit 11 and graphic depictions Exhibit 12.) In the lower aquifer, Bis(2-ethylhexylphthalate ("B2EP") was detected above the U.S. EPA maximum contaminant level (MCL)

in nine monitoring wells both up and down gradient from the Site. We believe the data is suspect, B2EP is a common component of plastics and may be related to sampling or laboratory methods. Further suspicion is cast on this data because B2EP is not found in the upper aquifer and prior sampling events by U.S. EPA and Ohio EPA did not show this chemical constituent in the lower aquifer. (ITM Report Exhibit 11) The only other chemical constituent identified in the lower aquifer, above the MCL was benzene in a well located on the extreme southern end of the Site. The data shows no groundwater contamination above the MCLs related to any of the alleged remaining drums on the Site. Additional groundwater monitoring will be conducted as the RI/FS data gathering phase is completed.

3) Samples from shallow monitoring wells have also been analyzed. (Exhibit 12.) Generally no exceedances of the MCL were identified in the perimeter shallow monitoring wells. For two wells, EPA-6 and EPA-8 the data support a conclusion that the area may contain leachate related to Areas 1 and 5. Again, the groundwater impact is not found in the perimeter well samples and additional groundwater monitoring will be conducted as the RI/FS data gathering phase is completed.

4) U.S. EPA previously reported that several drinking water wells in the area of the Site were contaminated with various organic compounds and the "[a]ffected residents have been connected to the Dayton municipal water supply." (Exhibit 13.) Thus, according to U.S. EPA there is no groundwater exposure potential for residents living near the Site.

C. No Access to Alleged Drums.

We have already addressed in my letter of April 3, 1998, the unlikely circumstance of direct contact to any of the alleged drums that remain at the Valleycrest Site. We disagree with the Draft AOC assertions that "[e]ven though the NSL Site has been fenced, breaches of the fence have occurred with regularity and the possibility of direct human contact cannot be discounted." (Draft AOC pg. 7 para. 6.a.)

1) The Site is ringed by a barbed-wire chain link fence. (Site Security Plan Exhibit 4.) On a monthly basis the fence is inspected and breaches, if any, are repaired. Since January 1998, a contractor to the VLSG has been at the Site on a daily basis recording data from landfill gas monitoring wells. Pursuant to a the Fire Mitigation Project," vegetation has been trimmed and will be maintained to allow easy inspection of the Site to preclude clandestine trespassers. (Exhibit 5 at pg. 4.) Consequently, there are more than adequate controls to prevent trespassers onto this Site.

2) Pursuant to the Fire Mitigation Project, all drums protruding more than three inches from land surface were removed from the site. (Exhibit 5 at pg. 6.) Consequently, there are presently no exposed drums or drum remnants on the Site. The statement made in the draft AOC that "[s]ome surface drums were removed from Area 1, additional drums remain," is incorrect based on current site conditions. (Draft AOC pg. 10 para. 6.f.) There are presently no drums above land surface at the Site.

Additionally, statements in the draft AOC pertaining to the number of drums removed from the surface during the Fire Mitigation Project are incorrect. The draft AOC states that "OEPA provided oversight to the removal of approximately 100 surface (partially buried) drums associated with the underground fire." (Draft AOC pg. 8 para. c.) The drum removal log prepared by the VLSG's removal contractor identified 25 drums/drums remnants that retained a majority of the original structure. (Exhibit 5 at pg. 7.)

3) Pursuant to the Fire Mitigation Project and with the agreement of Ohio EPA, all drums that protruded less than three inches above the land surface were covered with additional soil. (Exhibit 5 at pg. 8.) During the week of April 13, 1998, representatives of Ferguson Harbour and Ohio EPA walked the Site to insure that no potential drums or scraps of metal sat above land surface. All suspect potential drums and scraps of metal were covered with at least three inches of soil by Ferguson Harbour as directed by the Ohio EPA representative. Consequently, the statement in the Draft AOC that "[d]uring the March 5, 1998 U.S. EPA investigation, numerous mounded areas with partially exposed drums and drum parts in Disposal Areas 1 and 5 were observed" is not an accurate assessment of current Site conditions. (Draft AOC pg. 9 para. 6.c.) There is no potential for exposure to any alleged drums or scrap metal by anyone walking across the Site at the present time.

D. Disagreement on Characterization of Disposal Areas 1 and 5.

There is a factual disagreement on the composition of Disposal Areas 1 and 5. The draft AOC states that "Disposal Areas 1 and 5 were used as drum disposal areas." (Draft AOC pg. 3 para. 4.) The Draft AOC states that "historical information and photographs documented that drum Disposal Area 5 was exclusively utilized for 55 gallon drum disposal to a depth of twenty feet below existing grade and into the Site groundwater." (Draft AOC at pg. 5 para. 11.) (Emphasis added.) However, in other portions of the draft AOC the status of Disposal Area 5 is stated as being "used for disposal of drummed and other industrial wastes." (Draft AOC at pg. 3 para. 6.) Additionally, the U.S. EPA FIT team conducted a geophysical survey of Disposal Area 1 and reported no magnetic anomalies. (FIT Report Exhibit 6.) Historical aerial photographs available from the Miami Conservancy District which chronicles landfilling activities at the site will not support a finding that Disposal Areas 1 and 5 were used exclusively as drum disposal areas. (Aerial photographs Exhibit 7.) Additionally, photographs taken by a representative of the Miami Conservancy District in 1973 and 1974

establishes that Disposal Area 5 received wastes unrelated to drums. (Miami Conservancy District photographs taken by Mr. Paul Plummer Exhibit 8.)

The VLSG and Ohio EPA had a dispute as to whether to perform an additional investigation of Disposal Areas 1 and 5 for alleged hot spot areas. It has been the VLSG's understanding that the dispute was resolved by the VLSG agreeing to perform additional non-invasive investigations of the alleged hot spot areas in accordance with the 1991 RI/FS guidance for municipal landfills as it pertains to Type II landfills. Through the RI/FS process the data from this additional investigation would guide evaluation of whether treatment or removal of the drums and contents thereof would be needed during the remedial action. (Correspondence from Vincent B. Stamp to Jeffery Hurdley, Ohio EPA dated December 8, 1997 Exhibit 9.) Obviously the focus of this investigation would be to determine if drums are present at the site in a condition and quantity that would satisfy the criteria for "Hot Spot" consideration in the future remedial phase.

E. A Section 106 Administrative Order Would be Duplicative

Many of the tasks found in the Draft AOC have already been performed by the VLSG or will be performed pursuant to the FFOs.. At a minimum, the following tasks in the Draft AOC would duplicate tasks agreed to in the FFOs:

Work Plan
Health and Safety Plan
Site Security Plan
Quality Assurance Project Plan
Monthly Progress Reports
Access Agreements
Emergency Response Plan
Perform geophysical surveys in areas identified by Ohio EPA

Surely, U.S. EPA is not seeking to increase administrative and legal costs when the Site is already being addressed adequately. This would plainly violate the spirit of U.S. EPA's "reinvention" that is presently touts before Congress.

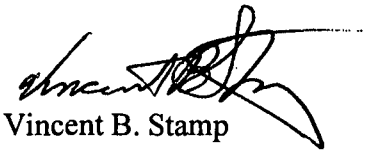
Finally, not only is the proposed action unsupported by the facts and the law, it also is inconsistent with USEPA's own guidance on the interaction of U.S. EPA and the States in a State led NPL site: "Also, EPA and the States should not be duplicating the others activities at the sites." (*USEPA Guidance on Funding CERCLA State Enforcement Actions at NPL Sites* Exhibit 14 at page 5.) As a result of the duplicative nature of the scope of the AOC itself the proposed 106 order is not consistent with the NCP.

G. Closing

For the reasons stated above, our Group respectfully requests that U.S. EPA withdraw the General Notice of Potential Liability letter dated March 18, 1998 and permit the VLSG to complete the RI/FS as agreed to under the FFOs.

The preceding information will be elaborated upon during our meeting scheduled for May 1, 1998. If you have any questions or require information in advance of that meeting, please do not hesitate to call.

Very truly yours,



Vincent B. Stamp

VBS:ss
cc: Sean Mulroney, Esq.
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Group Representatives

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April 15, 1998

VIA FACSIMILE AND FEDERAL EXPRESS

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RE: Valleycrest Landfill - Cargill, et al. v. Abco, et al.

Dear Mr. Stamp:

This letter is being sent by the undersigned on behalf of the Defendants listed in Exhibit A to this letter. Some of these Defendants are represented by our respective firms and some are not. This group of Defendants have a number of common issues and objections to the current allocation scheme proposed by the VLSG. We thought that we would highlight some of those issues for you in the following sections of this letter. This is not designed to be an exhaustive or all-inclusive discussion of the issues these Defendants have, but designed to start a dialog with the VLSG that may result in an acceptable resolution. We think you will see from the closing paragraph of this letter that this group of Defendants does not want to engage in acrimonious litigation from the outset, but would prefer to engage in meaningful negotiations. Please review the following sections with that in mind:

1. FAILURE TO ALLOW FOR CONTINGENT OFFERS TO JOIN GROUP

The process orchestrated by you and your clients is questioned by these Defendants because it calls for all Defendants to commit to a "share" or a "tier" before the corresponding financial liability is determined. Without knowing how many other "shares" are participating, a Defendant cannot estimate its financial exposure of participating. This methodology is unacceptable to these Defendants, all of whom believe that the financial component is an integral part of any allocation process. Unfortunately, you have shown an unwillingness to resolve this issue by considering "contingent" offers that some Defendants have proposed to make.

2. FAILURE TO PROVIDE AN ACCOUNTING OF COSTS

VLSG has not provided the Generator Defendants with a written itemization of past, nor a breakdown of estimated future, RI/FS (and removal action) costs. VLSG asserts that it has spent $2 million to date and estimates an additional $2.2 million will be necessary to complete the RI/FS process. Needless to say, such costs are significant. It simply is unreasonable to demand that the Defendants commit to pay a share of such costs (unspecified in amount at that) without, at the very least, providing a detailed accounting of such costs.

It is difficult enough to explain to one's management the concept of CERCLA liability, but to expect management to accept on blind faith the costs being allocated and what one's share of those costs ultimately will be is out of the question.

3. THE PROPOSED TIER SCHEME IS UNFAIR

Plaintiffs' allocation does not contain enough tiers. The disparity in the amount and nature of wastes generated among the various Defendants is too great to be accounted for by only four tiers (plus a de minimis category). First, under the present scheme, it appears that generators of significantly different types of wastes, different volumes of waste, generated over different lengths of time, may be placed within the same tier, and thus asked to make the same financial contribution. That is unpalatable. Second, it appears that there are a handful of Generator PRPs who bear a significantly higher equitable share of liability than the remainder. Consequently, those Generator PRPs should be placed in a separate tier.

Increasing the number of tiers will produce a fairer, more accurate assignment of costs, assuming of course, appropriate allocation criteria are used.

A second consequence of establishing only four tiers is an inflated "de minimis" buy-out figure. $7,500, absent more complete information from VLSG, is excessive. Increasing the number of tiers would facilitate a lowering of the de minimis buy-out, which in turn will encourage participation.

Another troubling aspect is the description provided for distinguishing the tiers in which each Defendant belongs. In reviewing this description and comparing it to the "evidence" provided in each Defendant's packet, we were unable to "tier" the Defendants

listed in Exhibit A in any rational fashion. We'd like to discuss how the VLSG was able to do this. It was extremely difficult to determine any tiering distinctions based on the limited criteria provided by the VLSG. Obviously, this raises fundamental questions as to the reasonableness and fairness of the VLSG's methodology

4. THE GENERATOR SHARE OF SITE COSTS IS UNREASONABLY HIGH

The VLSG's proposed allocation provides that the class of generator PRPs shall be responsible for 47% of total site costs. The proposal offers no rationale as to why this generator class allocation is reasonable, nor does it explain what percentages have been allocated to other PRP classes such as transporters or owner/operators. (We note that the proposed 47% generator share is significantly higher than the generator-class shares proposed at another local NPL site, the Powell Road Landfill.) Moreover, the proposal makes no reference to any municipal PRP allocation, although we presume that a separate allocation is being considered for municipal PRPs. Assuming municipal liability is to be capped, the VLSG proposed allocation makes no provision as to how the municipal PRP allocation will affect the other PRP classes.

5. THE PROCESS IS FUNDAMENTALLY FLAWED

Another concern that these Defendants have expressed is that the tiers of the various plaintiffs have not been delineated with specificity. These Defendants have found that one of the key factors in analyzing the proposed settlement is the relative placement of *all* other participants in the action. This includes an analysis of the evidence related to the Plaintiffs' participation in the Landfill, and the corresponding tiers in which those Plaintiffs have been placed. It is impossible for these Defendants to judge in relative terms their own liability when they do not have all the facts regarding the relative liability of all of the other participants in the action. For instance, Defendant X is not going to be willing to accept his placement in a tier until he knows that Plaintiff Y, regarding whom Defendant X has seen much incriminating evidence, is placed in an appropriate tier ahead of him.

This "relative analysis" is used by courts themselves when dealing with allocation issues. Most of us recognize the "Gore" factor analysis used over the years by courts in order to determine the liability of parties involved in Superfund cases. Many, if not all of the Gore factors are relativity-driven. They assume an analysis to be completed by weighing the

evidence as it pertains to each participant *relative to* that of the next participant. For example, one of the Gore factors (among others) involves an analysis by the court of the degree of involvement of the parties in the generation, transportation, treatment, storage or disposal of hazardous waste. This factor clearly involves an analysis of the degree of involvement of each party relative to the involvement of each other party. The Gore factors should have been a focal point of Plaintiffs' counsel in the development of the tiering system in this case. Without information as to the respective tiers of the Plaintiffs, however, the Defendants in this case cannot evaluate properly their own relative placement within that tiering system. The specific tier categories of each of the Plaintiffs therefore, must be delineated.

The lack of information disseminated regarding the Plaintiffs' specific relative liability only calls into question further the lack of impartiality inherent in a tiering system developed by interested parties. Despite the fact that you believe the tiering system to achieve some sort of "global justice," you represent interested parties in the case and therefore your vision of "justice" is necessarily going to differ from that of the Defendants in the case. While these Defendants are aware that you have conveyed certain factual bases upon which your tiering decisions were made, it is difficult for them to believe that the process was completely objective, a presumption seemingly confirmed by the fact that you have not delineated the tiers into which your own clients fall. When the allocator is not an independent objective party, that allocator should expect a heightened level of scrutiny. Complete openness is the only hope of successfully negotiating an allocation methodology that will pass judicial scrutiny. The Union Electric cases out of the Eighth Circuit are particularly instructive regarding the issues of substantive and procedural fairness in developing allocation formulas. This would include, among other things, notice and a fair opportunity for parties to participate in determining the allocation formula. Your proposal and process to date falls woefully short of the elementary standards used by most courts.

6. FAILURE TO PROVIDE AN AGREEMENT TO DISMISS LAWSUIT OR A COVENANT NOT TO SUE

Even if a Defendant were inclined to join the PRP Group, the Site Participation Agreement does not explicitly provide that the VLSG will dismiss the lawsuit against that PRP. Nor does the Agreement include a covenant that members of the group will not sue other members. Although the VLSG has indicated that both of these protections are provided

in Section 6.6 of the Agreement, which pertains to the assignment of claims, this provision provides inadequate protection. The first sentence contains, in what appears to be a typographical error, language that makes the meaning of the entire provision ambiguous. (It refers to an undefined term "Original New Operator Members"; when it probably means "Original Members, New Operator Members..."). Even if this typographical error were not made, the Agreement needs to contain explicit dismissal and covenant not to sue provisions to adequately protect potential new Group members. Additionally, we believe "de minimis" parties will require contribution protection and indemnity from the plaintiffs, which is not provided by the Participation Agreement.

Notwithstanding the criticisms voiced above, we agree with the VLSG that to avoid lengthy litigation and high transaction costs it may be in everyone's interest to form a viable PRP group that can continue the RI/FS work and remediate the Valleycrest site. We are confident that such a group can be created, but only if the PRPs are comfortable with the allocation process and are assured that a substantial portion of the PRPs will join. Once we arrive at an acceptable allocation, we can then address the negotiation of the Participation Agreement.

Through good faith negotiations with VLSG, we believe that we can achieve both of these critical elements. By May 5, 1998, we would like to meet with the VLSG to discuss how we can collectively form a viable PRP group in the most expeditious manner possible. To better ensure that we are all focused on these discussions, we ask that the VLSG postpone serving its complaint on any PRPs until June 1, 1998.

Very truly yours,

Timothy D. Hoffman

Very truly yours,

J. Wray Blattner
Thompson, Hine & Flory

TDH:msj

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EXHIBIT A

1. Amcast Industrial Corporation
2. Bendix Corporation
3. Bridgestone/Firestone, Inc.
4. Children's Medical Center
5. DAP
6. Dayton Forging & Heat Treating Company
7. Dayton Industrial Drum
8. Enterprise Roofing and Sheet Metal Company
9. F&M Contractors, Inc.
10. Fenton Foundry Supply Co., Inc.
11. Fryman-Kuck General Contractors, Inc.
12. Gayston Corporation
13. Gem City Engineering
14. Beverages of Dayton, Inc., d/b/a Pepsi-Cola Bottlers of Dayton
15. Grismer Tire
16. High Tech Castings, Inc.
17. Hyland Machine Co.
18. James River Corporation
19. Matlack, Inc.
20. The Mazer Corporation
21. Miami Products & Chemical Company
22. Monarch Marking Systems, Inc.
23. Oberer Development Company
24. Pantorium Cleaners, Inc.
25. Stolle Corporation
26. Systech Environmental Corporation
27. Tomkins Industries, Inc.
28. TRU Foto, Inc.
29. TRW, Inc.

30. United Parcel Service, Inc.

31 Van Dyne Crotty, Inc.

32. Williams Brothers Roofing & Siding Company

33. Yale Industries

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